Supreme Court of the United States

OCTOBER TERM, 1910

No. 178

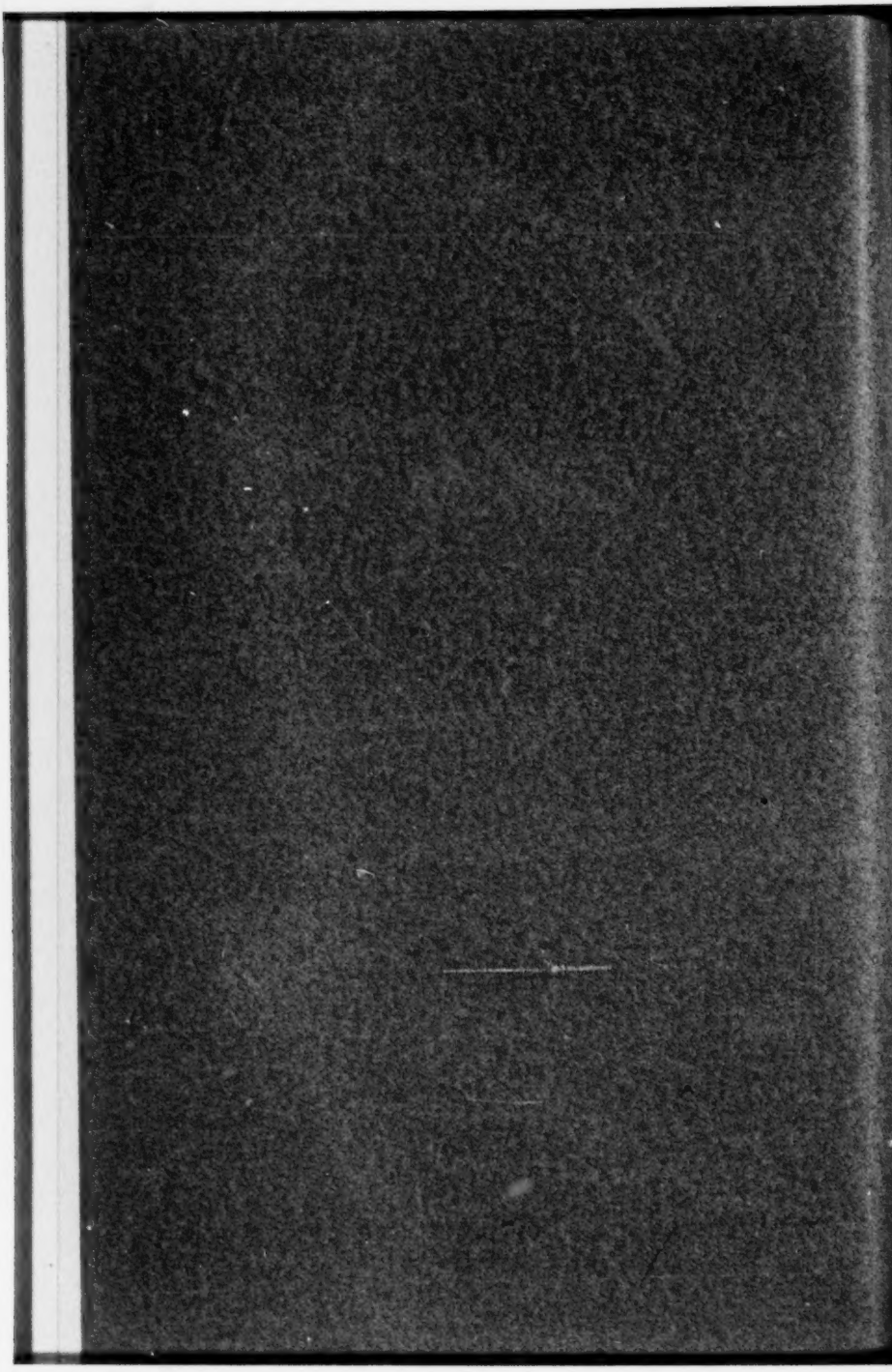
THE NORTH AMERICAN TRANSPORTATION AND TRADING COMPANY, as Owners of the Steamship "Komoka," Appellant,

vs.

T. J. KING and A. WINGE, copartners as KING & WINGE, and W. B. FRASER, Appellees.

REPLY BRIEF

FREDERICK DAUBMAN,
DANIEL KELLEHER,
Counsel for Appellant.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

No. 123.

THE NORTH AMERICAN TRANSPORTATION AND TRADING COMPANY, as Claimant of the Steamship "Roanoke," APPELLANT,

vs.

T. J. KING and A. WINGE, copartners as KING & WINGE, and W. B. FRASER, APPELLEES.

REPLY BRIEF

REPLY.

THE JURISDICTION OF THIS COURT.

The act of 1891 allows a direct appeal "in any cause in which the constitution or law of a state is *claimed* to be in contravention of the constitution of the United States." You yourselves have had occasion to italicise the word "claimed" when interpreting this clause of the act, (*Loeb vs. Trustees,* 179 U. S. 472) and have pointed

out the difference between this appellate provision and the one relating to your review of decisions of state courts. It is enough that an honest, though erroneous, claim is made. As was said by Mr. Justice White for the court in *Penn Mutual Life Ins. Co. vs. Austin,* 168 U. S. 685; 18 Sup. Ct. 223.:

"The contention here made, however, is not that the bill, without color of right, alleges that the state law and city ordinances violate the constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious, and should be maintained, without taking jurisdiction of the case."

Accordingly, this court took jurisdiction there, though it decided the case without reference to the federal question at all.

Equally in point is *Holder vs. Aultman,* 169 U. S. 81, another case of direct appeal. There an Ohio corporation sued a Michigan defendant on a contract to do a certain kind of canvassing and selling in Michigan. The defendant set up that this contract was invalid in Michigan by reason of a Michigan statute which put restrictions and a tax upon corporations in the alleged situation of the plaintiff and declared void contracts *made* by them *in that state.* Neither the plaintiff nor the defendant, it is to be noticed, had invoked the federal constitution in the pleadings. Now, the lower court found, upon the trial, that the contract, though prepared in Michigan, was finally signed only in Ohio. The statute was therefore a bad defense. But the lower court went

further. It decided that the statute, even so far as it purported to apply to interstate business like the plaintiff's, was void under the federal constitution. The judgment below was therefore for the plaintiff. Then defendant brought the cause here by error direct. Was it a case, however, for direct appeal within the act of 1891? You so held. Your decision is all the more in point here because you agreed with the lower court that the contract was made in Ohio, whereas the Michigan law on its very face attacked only contracts made in Michigan. You could not, accordingly, say that the claim of its violating the federal constitution was correct. Did your jurisdiction then fail? Certainly not. The claim, though unnecessary or erroneous, had been set up in apparent good faith in the progress of the case and that, under the act, gave you the whole case for review. What you did was to retain jurisdiction, to ignore the federal question as unnecessary or wrong, and to decide in plaintiff's favor because the statute set up by defendant never intended to vitiate such a contract as plaintiff's at all.

In view of these decisions, and particularly the latter, we see little point in the objection made by the appellees here that we did not claim the Washington statute to be void in all cases, that we claimed it void only as to us in that instance. This is always the situation where a state law is attacked under the commerce clause. Such a law may be good in some instances and bad in others, for it is not necessarily unconstitutional in all, as the Michigan statute in the *Holder* case might have been good enough against contracts made in that state for performance there.

Passing to appellees' next point, we agree with them that, to secure review by you, we must show that our

questions were called to the attention of the lower court or were necessarily passed upon by it. We cannot agree with them, though, that these things did not happen there. What else was there in our answers to the libels but the constitutional claims? The allegations of the libels were almost entirely admitted by us and we then narrated the "Roanoke's" ocean going character and interstate business, together with her owner's (substantially in the language employed in *Morgan v. Parham,* 16 Wall. 471), and then expressly named and quoted the invoked clauses of the federal constitution so that there was nothing else for the court to consider. This brought us within numerous decisions of this court, for we had actually done everything reasonable to make our position plain. Over and above all, we secured from the lower court a certificate indisputably showing that he had considered our defenses. That certificate, however unnecessary for jurisdiction, is certainly not only useful in many other respects, but is a very fair way, we should think, in cases otherwise doubtful, of showing that the lower court actually did hear and pass upon a particular question.

Even when the federal constitution is not specifically referred to at all, this court retains jurisdiction where it can plainly see that the lower court could not have avoided passing on such a question (*Columbia Water Power Co. v. Columbia, etc., Co.* 172 U. S. 475, and cases cited.) Here the constitution is so positively appealed to as to leave this matter not open to serious debate.

Respectfully submitted,

FREDERICK BAUSMAN,
DANIEL KELLEHER,
Proctors for Appellant.